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Insurance, Banking, Construction & Government

A Daily Bulletin listing Decisions of Superior Courts of Australia

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Executive Summary (1 minute read)

Keys v J P Morgan Administrative Services Australia Ltd - contract - repudiation by employer of employment contract - loss not shown (I, B)

Manday Investments Pty Ltd v Commonwealth Bank of Australia (No 3) - misleading or deceptive conduct - summary judgment on claim of implied term - no summary judgment on misleading or deceptive conduct claim (B)

Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 3) - costs - public interest litigation - no order as to costs (I, C, G)

DA.MET (Aust) Pty Ltd v The Ship "Seahorse" - admiralty - plaintiff's debt against defendant established (B)

Gacic v John Fairfax Publications Pty Ltd - bias - Court of Appeal allowed appeal and remitted decision on damages to trial judge - reasonable apprehension of bias on part of trial judge (I)

Royal Guardian Mortgage Management Pty Ltd v Nguyen - costs - security for costs motion settled - discretion of court below miscarried on costs - discretion re-exercised (I, B)



Bird v Cannington - setting aside judgments - succession dispute - Court not satisfied consent orders made against good faith - orders not set aside (I)

Whelan Air Conditioning Pty Ltd v Arcape Pty Ltd - security for costs - counterclaim meant plaintiff properly categorised as defendant in the central claim in the dispute - security for costs not ordered (I, B)

Harrex v Hall-King - application for trial of separate question - limitation defence - evidence would be significantly duplicated - application for trial of separate question dismissed (I)

Summaries with links (5 minute read)

Keays v J P Morgan Administrative Services Australia Ltd [2012] FCAFC 100

Full Court of the Federal Court of Australia

Gray, North & Besanko JJ

Contract - Keays claimed J P Morgan repudiated and breached his employment contract - held: advertised job description, with modifications accepted by parties in pre-employment negotiations, became part of employment contract - repudiation does not require subjective intention - profound changes to employee's responsibilities may amount to repudiation - J P Morgan had repudiated contract by removing Keays' responsibilities for foreign exchange sales - Keays had accepted repudiation, and had not shown any consequent loss - other alleged repudiations not established (Gray J dissenting on this point) - misleading or deceptive conduct by J P Morgan not established - appeal dismissed.

[Keays](#) (I, B)

Manday Investments Pty Ltd v Commonwealth Bank of Australia (No 3) [2012] FCA 751

Federal Court of Australia

McKerracher J

Misleading or deceptive conduct - applicant sued Bank and valuers - Bank allegedly withdrew support when security wrongly undervalued - Bank allegedly engaged in misleading and deceptive conduct and breached of implied term of loan contract by relying on valuation - valuers allegedly misled Bank - Bank and valuers sought summary judgment - held: loan contract had



expired with no automatic right of renewal - claim for breach of implied term could not succeed - should be summarily dismissed - claim of misleading and deceptive conduct should go to trial - question what Bank would have done had valuation been higher should be determined by testing the evidence.

[Manday Investments](#) (B)

Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 3)

[2012] FCA 744

Federal Court of Australia

Besanko J

Costs - applicant had unsuccessfully sought review of Minister's decision to approve expansion of Olympic Dam - applicant said he should not have to pay costs because of the public interest nature of his litigation - held: question of costs was finely balanced - characterisation of application as public interest litigation does not of itself justify no order as to costs - applicant was aboriginal elder - points raised by applicant sufficiently complex and important - no order as to costs.

[Buzzacott](#) (I, C, G)

DA.MET (Aust) Pty Ltd v The Ship "Seahorse" [2012] FCA 752

Federal Court of Australia

Collier J

Admiralty - plaintiff did repairs on the Seahorse at request of owner - invoices only partly paid - defendant claimed the plaintiff had retained the original engine and had attempted to pass off a substitute engine - the Seahorse was arrested - held: plaintiff's evidence more credible than defendant's - engine substitution not proved - judgment for plaintiff.

[DA.MET](#) (B)

Gacic v John Fairfax Publications Pty Ltd [2012] NSWSC 793

Supreme Court of New South Wales

Harrison J

Bias - Sydney Morning Herald published unfavourable review of plaintiff's restaurant - plaintiff sued in defamation - trial judge held publisher had complete defence - Court of Appeal allowed appeal, and remitted matter to trial judge for assessment of damages - plaintiff asked trial judge to recuse himself on basis of apprehended bias - held: trial judge had made preliminary assessment



of damages at first instance - had seen witnesses and presumably formed a view about them - objective observer may not accept judge who had expressed a certain view would be free from predisposition - matter should be transferred to another judge.

[Gacic](#) (I)

Royal Guardian Mortgage Management Pty Ltd v Nguyen [2012] NSWSC 769

Supreme Court of New South Wales

Adamson J

Costs - security for costs motion settled when third party offered guarantee of costs - court below ordered plaintiff to pay defendant's costs of motion - plaintiff appealed - held: costs a matter of discretion - *House v The King* [1936] HCA 40; 55 CLR 499 - general rule that costs follow the event - no reasons for departure from general rule - court below held plaintiff's conduct not unreasonable - discretion miscarried - discretion re-exercised - defendant to pay plaintiff's costs.

[Royal Guardian Mortgage Management](#) (I, B)

Bird v Cannington [2012] NSWSC 789

Supreme Court of New South Wales

Rein J

Setting aside judgments - succession dispute - sister claimed against brothers and executor - preliminary discovery application discontinued - order by consent that plaintiff pay costs of preliminary discovery application against executor - plaintiff sought to have costs order set aside - alleging the costs order was made against good faith - r36.15 *Uniform Civil Procedure Rules* 2005 (NSW) - held: desirability of finality in litigation - judgments and orders set aside only in limited circumstances - plaintiff had to show consent orders were procured by misconduct or dishonourable conduct that undermined plaintiff's consent - Court not satisfied orders made against good faith - orders not set aside.

[Bird](#) (I)

Whelan Air Conditioning Pty Ltd v Arcape Pty Ltd [2012] QSC 187

Supreme Court of Queensland

Boddice J

Security for costs - lessor of Rockhampton hotel had option under lease to acquire plant and equipment, including gaming machines - lessor purported to exercise option - lease terminated - lessee sued - lessor sought security for costs - held: plaintiff a corporation - likely it would be



unable to satisfy costs order if unsuccessful - delay in bringing application explained - natural person behind plaintiff offered to be personally liable for any costs order - counterclaim meant plaintiff properly categorised as defendant in the central claim in the dispute - security for costs not ordered.

[Whelan Air Conditioning](#) (I, B)

Harrex v Hall-King [2012] TASSC 45

Supreme Court of Tasmania

Porter J

Trial of separate question - plaintiff injured in motor vehicle accident - defendant argued the action was statute barred - s5A *Limitation Act* 1974 (Tas) - date of discoverability in issue - plaintiff applied for trial of limitation issue as separate question - held: power to order trial of separate question must be exercised judicially, but is not otherwise fettered - determination of date of discoverability issue would require credibility-based assessment of evidence of onset of symptoms - such evidence would be significantly duplicated at trial on other issues - application for trial of separate question dismissed.

[Harrex](#) (I)

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